Supreme Court, U.S.
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No. 85-420

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARY BRICK, SUCCESSOR TO JOHN BRICK, PETITIONER

v.

ALAN McSURELY AND MARGARET McSURELY

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly held a Senate aide liable in damages for his conduct in returning copies of documents that had been used in a congressional investigation.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, John K. McClellan, administrator of the estate of John L. McClellan, and Murray Knabe, administrator of the estate of Evelyn Adlerman, successor to Jerome Adlerman, were defendants in the district court and appellants in the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Constitutional provision involved 2

Statement 2

Reasons for granting the cross-petition 6

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Butz v. *Economou*, 438 U.S. 478 8

Doe v. *McMillan*, 412 U.S. 306 ..... 7, 8

Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 7

Gravel v. *United States*, 408 U.S. 606 7

Hutchinson v. *Proxmire*, 443 U.S. 111 8

Tenney v. *Brandhove*, 341 U.S. 367 7

Constitution:

U.S. Const. :

Art. 1, § 6, Cl. 1 (Speech or Debate Clause) 2, 4, 5, 6, 7

Amend. I 3, 5

Amend. IV 3, 5

Amend. V 3

Amend. XIV 3

Page

Miscellaneous:

Restatement (Second) of Torts (1977) 7

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of Mary Brick, successor to John Brick, cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. This cross-petition is conditioned on the granting of the petition for a writ of certiorari filed by cross-respondents Alan McSurely and Margaret McSurely in No. 85-241, which seeks review of the same judgment. The Solicitor General will be filing a brief in opposition to that petition on behalf of the respondents. In the event that the petition in No. 85-241 is denied, this cross-petition should be denied (see Rule 20.5 of the Rules of this Court).

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-57a)[1] is reported at 753 F.2d 88. Earlier opinions of the court of

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[1]"Pet. App." refers to the appendix to the petition in No. 85-241.

appeals are reported at 697 F.2d 309, 553 F.2d 1277, 521 F.2d 1024, and 426 F.2d 664.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a-59a) was entered on January 18, 1985, and a petition for rehearing was denied on March 19, 1985 (Pet. App. 60a). On June 11, 1985, the Chief Justice granted cross-respondents an extension of time to and including August 16, 1985, within which to file a petition for a writ of certiorari, and their petition (No. 85-241) was filed and served on August 12, 1985. This cross-petition is filed under Rules 19.5 and 20.5 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article 1, Section 6, Clause 1 of the Constitution provides in pertinent part:

> [F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.

STATEMENT

The facts and procedural history of this case will be set forth more fully in the brief in opposition to the petition in No. 85-241. They are described here only insofar as is germane to this cross-petition.

1. On August 11, 1967, local law enforcement officials of Pike County, Kentucky arrested cross-respondents Alan and Margaret McSurely on charges of violating Kentucky's anti-sedition statute. In the course of executing a search warrant, the officials seized a large quantity of the McSurelys' personal papers and belongings. The next day, Pike County prosecutor Thomas Ratliff announced that he intended to make these materials available to congressional committees. Pet. App. 4a.

In September 1967, a staff member of the Permanent Subcommittee on Investigations of the Senate Government Operations Committee, which was authorized to " 'investigat[e] into the causes of civil and criminal disorder that were racking the nation during this period' "(Pet. App. 33a n.17 (citation omitted)), was advised that the materials in Ratliff's custody included "information regarding efforts to organize young people 'to engage in violence and demonstrations' "(*id.* at 6a (citation omitted)). Shortly thereafter, cross-petitioner's decedent, John Brick, a subcommittee investigator, traveled to Kentucky at the direction of Jerome Adlerman, general counsel to the subcommittee. Brick inspected the materials and returned to Washington with copies of 234 documents. *Ibid.*

On November 8, 1968, following litigation over congressional subpoenas issued to the McSurelys, Brick traveled again to Kentucky to serve new subpoenas on them. At the same time, Brick returned to the McSurelys the 234 copies of documents that had been in the subcommittee's possession. The documents "revealed the details of a love affair" in which Margaret McSurely was involved before her marriage (Pet. App. 8a). Alan McSurely testified that Brick instructed him to read through each of the documents as they were returned (*ibid.*).

2. The McSurelys filed this action in the United States District Court for the District of Columbia on March 4, 1969. The complaint, as amended, sought compensatory and punitive damages against Brick and several other defendants, including Ratliff, Adlerman, and Senator John L. McClellan (the chairman of the subcommittee), for alleged violations of the plaintiffs' rights under the First, Fourth, Fifth, and Fourteenth Amendments. The allegations against Brick rested primarily on his role in inspecting the materials seized by Ratliff and transporting the 234 copies of documents to Washington. See 553 F.2d 1277, 1284 (1976).

Brick and the other Senate defendants filed a motion for summary judgment on the ground that they were entitled to immunity under the Speech or Debate Clause. The district court denied this motion, and the Senate defendants filed an interlocutory appeal. Pet. App. 10a. Following a divided panel decision (521 F.2d 1024 (1975)), the court of appeals reheard the appeal en banc (553 F.2d 1277 (1976)). Although it held that the defendants were entitled to immunity with respect to certain of the McSurelys' claims, the en banc court of appeals, by an equally divided vote, affirmed the denial of their summary judgment motion with respect to the claims "concerning the action of subcommittee investigator Brick in inspecting the documents and transporting copies of some of them to Washington prior to issuance of a subcommittee subpoena" (*id.* at 1280). This Court granted the Senate defendants' petition for a writ of certiorari (434 U.S. 888 (1977)), but dismissed the writ as improvidently granted (438 U.S. 189 (1978)).

3. Following several years of discovery, the case went to trial in 1982.[2] During the trial, the district court permitted the McSurelys to amend their complaint to add a claim that the defendants violated their common law right of privacy, "based solely on the factual allegations already contained in

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[2]While the interlocutory appeal was pending, defendants Brick and Adlerman died. After the petition for a writ of certiorari was filed, defendant McClellan also died. This Court granted a motion to substitute the estate of McClellan (434 U.S. 1043 (1978)). On remand, the district court granted a motion filed by the McSurelys to substitute the widows of Brick and Adlerman over the objections that the motions were untimely and that the widows were not proper parties because they were not legal representatives of their husbands' estates. When Adlerman's widow subsequently died, the district court substituted her estate, again over objection. The court of appeals upheld these substitutions (Pet. App. 15a-19a). Although we believe that this ruling is erroneous, we are not presenting the question in this cross-petition.

the Complaint" (1 C.A. App. 337).[3] In special verdicts, the jury assessed damages totalling $105,000 against Brick, $42,000 for violating the Fourth Amendment, $42,000 for violating the First Amendment, and $21,000 for violating the McSurelys' common law right of privacy (Pet. App. 19a-20a n.7, 26a n.12, 36a n.19). The jury also assessed damages of $1.5 million against the other defendants, most of it against Ratliff (*id.* at 13a).

The court of appeals reversed the judgments against the Senate defendants except with respect to the $21,000 privacy award against Brick (Pet. App. 1a-57a).[4] The court reversed the Fourth Amendment awards on the ground that they were barred by qualified immunity because the defendants violated no clearly established constitutional rights (*id.* at 19a-26a). Next, the court reversed the First Amendment awards for two independent reasons: first, on the ground that the defendants did not violate the First Amendment and second, on the ground that the defendants were immune from suit under the Speech or Debate Clause (*id.* at 26a-35a). Finally, the court upheld the common law award against Brick alone on the ground that his conduct in requiring Alan McSurely to read his wife's correspondence in the copies of the documents that Brick returned to the plaintiffs violated their right of privacy (*id.* at 36a-53a). The court held that Brick was not entitled to immunity with respect to this claim on the ground that his conduct was

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[3]The amendment was based on Judge Leventhal's suggestion that the McSurelys might have a cause of action against Brick "for acting outside of judicial channels in inspecting the materials * * * and transporting copies back to Washington" (553 F.2d at 1294). Plaintiffs explained that no new factual allegations would be required to support their claim because "Brick's *seizure* of the * * * personal correspondence * * * was an unwarranted intrusion upon [their] right of privacy" (1 C.A. App. 244 (emphasis added)).

[4]Ratliff's appeal was dismissed following the conclusion of a settlement agreement (Pet. App. 3a).

"not even arguably within the outer perimeter of [his] line of duty" (*id.* at 53a).

REASONS FOR GRANTING THE CROSS-PETITION

For the reasons to be stated in the brief in opposition in No. 85-241, the petition for a writ of certiorari filed by cross-respondents should be denied. As the court of appeals concluded (Pet. App. 54a), "[t]he curtain ought to be drawn" on this litigation, now more than 16 years old. If the McSurelys' petition is granted, however, simple fairness requires that this cross-petition also should be granted in order that the Court may review the entire judgment of the court of appeals. Should the Court reach the Speech or Debate Clause question presented by cross-respondents, it would then be in a position to apply the law to the one part of the case in which the court of appeals held that no immunity was available.

The court of appeals erroneously concluded (Pet. App. 51a-53a) that Brick was not immune under the Speech or Debate Clause for his conduct in returning the copies of documents that he had taken to Washington for use by the Senate subcommittee.[5] The court of appeals rested its

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[5]The court of appeals also erred in affirming the common law privacy violation on a theory that had not been presented to the jury and in holding that Brick had committed an actionable invasion of privacy. While the complaint contains a brief allegation with respect to Brick's return of the documents, the case was tried on the theory that only the *seizure* of the documents was tortious (see note 3, *supra*). As the district court instructed the jury (5 C.A. App. 1704): "[P]laintiffs claim that the defendants * * * conspired to transfer to the Senate Committee documents which had been unlawfully seized * * * [in violation of] the right of privacy." The *return* of the documents therefore cannot, as the court of appeals concluded (Pet. App. 37a), "provide[] the evidence on which the jury verdict for the McSurelys properly rests." In any event, the court of appeals cited, and we are aware of, no case holding that giving copies of a wife's letters to her husband constitutes a publication of private facts in violation of the common law right of privacy. See

denial of immunity on its view that Brick used "manifestly excessive means" (*id.* at 53a) to return the documents because he required Alan McSurely to read through his wife's love letters. "[T]he absolute nature of the speech or debate protection" (*Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 509 (1975) (footnote omitted)), however, requires that "Congressmen and their aides [be] immune from liability for their actions within the 'legislative sphere,' * * * even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan*, 412 U.S. 306, 312-313 (1973) (quoting *Gravel* v. *United States*, 408 U.S. 606, 624-625 (1972)).

Brick plainly was acting within the protected legislative sphere. When he returned the copies of documents that had been in the subcommittee's possession, Brick was performing, pursuant to arrangements made by his superiors in the subcommittee, a necessary step in an ongoing congressional investigation. It would be anomalous to characterize Brick's role in returning the documents as outside the scope of his legislative duties as a subcommittee investigator when his role in obtaining the documents in the first place was part of those duties. See, *e.g.*, *Doe* v. *McMillan*, 412 U.S. at 312-313 (Speech or Debate Clause immunizes introduction of materials at congressional hearings); see also *Tenney* v. *Brandhove*, 341 U.S. 367 (1951) (state legislators not liable for conduct of investigation).

Restatement (Second) of Torts § 652D comment a (1977) (publicity requirement "means that the matter is made public, by communicating it to the public at large[;] * * * it is not an invasion of the right of privacy * * * to communicate a fact concerning the plaintiff's private life to a single person").

Even if Brick's conduct was, as the court of appeals thought (Pet. App. 50a), "highly offensive," it fell far short of exceeding "the outer perimeter of [his] line of duty" (*id.* at 53a). Brick did not "disseminate [the McSurelys' papers] to the public at large" (*Doe* v. *McMillan*, 412 U.S. at 316) or "scatter[] [them] far and wide" (*Hutchinson* v. *Proxmire*, 443 U.S. 111, 132 (1979)). By requiring Brick to respond in damages for showing insufficient sensitivity to the nuances of the McSurelys' relationship with one another, the court of appeals has improperly stripped him of his immunity merely for a "mistake[] in judgment." *Butz* v. *Economou*, 438 U.S. 478, 507 (1978). This ill-considered attempt by the court of appeals to provide a measure of relief (beyond the settlement with Ratliff) to litigants whom it viewed sympathetically (see Pet. App. 54a) should not go unreviewed if, contrary to our submission, the Court grants the McSurelys' petition.

CONCLUSION

If this Court grants the petition for a writ of certiorari in No. 85-241, it should also grant this cross-petition. If the petition in No. 85-241 is denied, this cross-petition should also be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

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Petitioner,

v.

ALAN McSURELY and MARGARET McSURELY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS-PETITION

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Question Presented

Whether the Speech or Debate clause bars a judgment for damages against a Senate aide for invasion of privacy committed in the course of returning to their owner papers that he had taken in the first instance without subpoena or other lawful process.

Table of Contents

	Page
Question Presented	1
Table of Cases	1
Argument	2
Conclusion	6

Table of Cases

	Page
Dombrowski v. Eastland, 387 U.S. 82 (1967)	2, 3, 4
Gravel v. United States, 408 U.S. 606 (1972)	2, 3, 4

ARGUMENT

The government has filed a contingent cross-petition to review the affirmance by the court of appeals of the privacy award of $21,000 against Brick for the "manifestly excessive means" he used in returning respondents' documents to them. It urges that the court erred in not clothing Brick with immunity under the Speech or Debate clause because he "was performing, pursuant to arrangements made by his superiors in the subcommittee, a necessary step in an ongoing congressional investigation. It would be anomalous to characterize Brick's role in returning the documents as outside the scope of his legislative duties as a subcommittee investigator when his role in obtaining the documents is the first

place was part of those duties" (Cross-Pet. 7).

The significance of the government's cross-petition is that it should remove any doubt as to the need for this Court's granting the petition in No. 85-241 so that it may put an end to the gross misinterpretation of the Speech or Debate Clause which pervades the opinion below.

The government's position on its cross-petition is identical with its position in its Brief in Opposition to the petition in No. 85-241 attempting to ignore the clear line of demarcation drawn by this Court between conduct that is merely related to the legislative process and conduct that is a legislative act (P. 22-23). The government's position conflicts head on with Gravel v. United States, 408 U.S. 606 (1972) and Dombrowski v. Eastland, 387 U.S. 82 (1967), which established that

investigatory activity conducted without benefit of subpoena, though it may be related to a legitimate investigation, does not immunize members of Congress or their aides who violate law in conducting the investigation. In Gravel the Court stated explicitly that members of Congress would not be "immune" if "in order to secure information for a hearing [they] themselves seized the property or invaded the privacy of a citizen. 408 U.S. at 621. In that case a legislative aide was not immunized from a grand jury subpoena seeking out the source of classified documents which came into a Senator's possession. In Dombrowski, despite the claim of Speech or Debate immunity, the Court remanded for trial a charge that a Senate employee had engaged in a raid which violated fourth amendment rights. The government's refusal to acknowledge the force of these cases that

are precisely in point emphasizes the need for this Court's acceptance of the petition No. 85-241 so as to put an end to the obfuscation of this important area of law.

The consequences that would ensue if Gravel and Dombrowski were not the law of the land are appalling to contemplate. Members of Congress and their staff aides, numbering some 15,000 (Pet. in No. 85-241, 29), would be free of all restraints in conducting investigations so long as they claim, however, tenuously, that the investigation had been authorized and pertain to a matter on which legislation may be had. They could bribe, blackmail, and burglarize or torture with impunity. (Pet. in No. 85-241, 26).

The extreme position of the government is perfectly revealed in the facts of this particular case. The Department

of Justice is literally claiming legislative immunity when a legislative aide as part of his informal legislative activities reveals to a husband the premarital sexual history of his wife!

This Court should not review the one issue on which the court below reached a correct result (even if, for the wrong reasons, as we pointed out in our Petition in No. 85-241 at 31-33), though there is a clear need to review the remaining portions of the opinion.

Conclusion

The cross-petition for certiorari should be denied.

Respectfully submitted,

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